NO. 20942

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT C. HILL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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In reply, appellant will respond to the arguments made by appellee which were limited to the Trial Court's findings that he had no standing regarding his Motion to Suppress Evidence, and there was no Denial of Due Process.

Appellee does not dispute all of the other allegations made by appellant and its non-response to these allegations may be a tacit admission of their validity.

Appellant may ignore some arguments in appellee's brief when he feels that the matter was sufficiently covered in his Opening Brief.

It should be noted that appellee inserted approximately five to six pages of detailed information to set forth its Statement of Facts

and only seven pages for its entire argument. Appellant submits that the reasoning behind this "maneuver" is to tell this Court that even though the Trial Court may have committed error, the appellant was "obviously" guilty; and therefore, appellee should prevail.

I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE.

The main difference between appellant's argument and appellee's argument is the definition of "a person aggrieved" as stated in Rule 41(e), Federal Rules of Criminal Procedure. The leading case of Jones v. United States, 362 U.S. 257, 261 (1960) defined Rule 41(e) as follows:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure', one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. . . ."

Jones defined "a person aggrieved" as one who was the victim of the search or seizure, one against whom the search was directed. Was appellant the victim of the search? Was he the one against whom the search was directed? Or was the search directed

against someone else, making him a consequential victim of that search?

These were the guidelines in the Jones case. Can there be any question that the search and seizure was directed against appellant and only against appellant? Chief Davis had a criminal complaint against appellant when he sought a search warrant. IALS was defunct at that time. The records obtained by Chief Davis were not directed against someone else, since there was no one else Chief Davis wanted when he picked up the records. He came to Los Angeles in order to carry out an investigation against Robert C. Hill, the appellant (R. T. 514). We repeat, "Appellant was IALS". This fact was borne out under cross-examination of appellant (R. T. 1860-1861). Even appellee admitted this fact and based its prosecution on this assumption (R. T. 102, 2045).

Appellee never states who was the victim of the search and seizure, the one against whom the search was directed! Appellee only tries to argue that appellant was not that person. If not appellant, then whom? Surely not IALS, that was not even in existence at that time. To say that appellant was not the person against whom the search was directed is to distort the Jones case and Rule 41(e) beyond the limits of reason.

Appellee relies heavily on the case of Lagow v. United States, 159 F. 2d 245 (1946), for its authority that appellant has no standing in his Motion to Suppress. That case was decided in 1946 while subsequent cases held that an individual who is personally identified as the corporation could move to suppress unlawfully

seized evidence even though it was allegedly in the name of the corporation, Henzel v. United States, 296 F. 2d 650 (5th Cir. 1961); Villano v. United States, 310 F. 2d 680 (1962). The Lagow case was a very brief opinion and it did not state if the defendant was the president, director, officer, organizer or operator of the corporation. The Henzel case did bring out these facts and then ruled that the defendant could suppress evidence consisting of corporate records that were obtained by unlawful search and seizure.

Appellee attempts to distinguish the Henzel and Villano cases with the present case by stating that the factual situations were different. Although one should examine the factual situations of each case before citing them, it does not mean that the two cases must have an identical factual situation before the law is applicable, as very few cases have identical facts.

Appellee attempts to refute the Henzel case with Peel v. United States, 316 F. 2d 907 and United States v. Culver, 224 F. Supp. 419 (1963), which is a Trial Court case. In the Peel case, the Court held that a Subpoena Duces Tecum was valid against a corporation and that defendants could not object if the corporation records were turned over to the United States for prosecution. The Court took pains to mention that defendants were not officers or directors of the corporation when its records were subpoenaed.

With regard to the separate identity of a corporation, appellee argues on Page 12 of Appellee's Brief:

> "First, the separate identity of the corporation and its officers and/or shareholders must be recognized.

The numerous cases holding that a corporate officer cannot refuse to produce corporate records under subpoena on the grounds of self-incrimination reinforce this distinction. See, e.g., Hyster v. United States, 338 F. 2d 182 (9th Cir. 1965); Wild v. Brewer, 329 F. 2d 924 (9th Cir. 1964); United States v. Goldberg, 330 F. 2d 330 (3rd Cir.), cert den. 84 S. Ct. 1630 (1964), all decided since Jones."

Appellant does not contend one way or another that a valid subpoena duces tecum for corporate records can be suppressed by an officer of the corporation since this is not the issue of the present case. Appellee talks about a valid subpoena duces tecum of an existing corporation. The facts in the present case concern an unlawful search and seizure of a defunct corporation that never really existed.

Suppose there was an unlawful search and seizure of a valid existing corporation. How could it object? Is it a living being? The cases of Silverthorne Lumber Co. v. United States of America, 251 U.S. 385, 40 S. Ct. 182, 64 L. ed. 319, 24 A. L. R. 1426 and Henzel v. United States, supra, stated that a corporation has the same rights as a natural person to be free from illegal search and seizure. The only way to protect this right is through its officers. In this case, appellant was the president, officer, organizer, and sole operator of his business. What better person to object on behalf of the corporation? In either situation, the Motion to

Suppress should have been sustained, since the unlawful search and seizure was directed against appellant as an individual or against IALS as a corporation, and appellant could object on behalf of the corporation. Appellee tries to refute this argument by taking a question and answer out of context (Appellee's Argument, Page 12) and stating that the appellant transferred all of his interest in the files to Mr. Sherief. If appellee read a little further, it would have discovered:

> "Q. After you turned over the files to Mr. Sherif, did the files then belong to Mr. Sherif?
>
> "A. No, I wouldn't say that they belong to Mr. Sherif. They belonged to me. They were given to Mr. Sherif to continue working on." (R. T. 1984).

Appellant further testified that Mr. Sherief had limited authority over the files and that they were subsequently taken from Mr. Sherief to the home of Mrs. Leland Hill where appellant examined them and found them intact (R. T. 126, 128, 129, 134, 135).

II

APPELLANT WAS DENIED DUE PROCESS OF LAW

It is contended by appellee that the seized documents were handled with care, as stated by former Deputy District Attorney

Michael Kershaw of Fresno County (R. T. 1732, 1737, 1738) and that Chief Davis testified that the files were in the same condition at the time of trial as when he seized them (R. T. 520).

Mr. Kershaw stated that the files were placed in various offices for storage (R. T. 1730) and that he left his employment in 1960 (R. T. 1723), so how could he state that none were lost or discarded? As for Chief Davis, he admits that he knew nothing of the files after they were stored at the District Attorney's Office (R. T. 521). What evidence did the United States produce to counter appellant's sworn statement that many documents were missing when he examined the folders on January 8, 1965? The United States did not produce one witness to testify that the files remained intact during the four years that they were in the government's possession (R. T. 511). Not one shred of evidence to indicate where the files were stored or who had possession of them! If appellee did not believe appellant's sworn statement, why didn't it attempt to prove him wrong? The only attempt was made by Chief Davis, who stated:

> "Q. Just now, for illustration, please, Chief, I show you a file here and if you will look at it, please, sir, and tell us in the main, if when you went through the files that you took under and by means of the search warrant and otherwise, you saw other papers other than the papers that you see in that file? Now, I mean not by identity, but others, meaning looking different.
>
> "A. Well, as I say, this has been so long ago, I -- at that time, I wasn't too much interested in this

thing, of really making this stick with me, but as I recall, this looks like the way that most of the files were." (R. T. 519-520).

Later on, while still under cross-examination, Chief Davis stated:

"Q. Well, did the inventory show how many files were in the boxes, each box?

"A. Well the most of the inventory was actually done by Mr. Kershaw and one of the other deputy district attorneys. I was just in and out of the--because I was performing my duties at my department and still working with the D. A. 's office, which is a period of twenty miles distance, and I was back and forth between the two offices, as I could find time.

"Q. Well, Chief, are you then saying you don't know?

"A. Well, that is just about it, to be honest with you." (R. T. 521).

Appellee states that it had "throw (sic) open its entire files for the appellant to peruse at his leisure". When? Ten days before the trial!

Appellee's actions were a flagrant disregard for appellant's Due Process of Law since appellant's sworn affidavit stated that documents necessary to his defense were missing while in the hands of the authorities and his attorney could not prepare a defense to the charges against him without these documents (C. T. 64, 75).

Respectfully submitted,

JACK HADDAD

Attorney for Appellant

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Jack Haddad

JACK HADDAD